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Supreme Court, U. S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 74-49

SUNSET COVE, INC., an Oregon corporation,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Argument	5
Appendices:	
A	1a
B	1b

TABLE OF AUTHORITIES

	Page
Cases	
Bonelli Cattle Co. v. *Arizona*, 414 U.S. 313, 325, et. seq., 94 S. Ct. 517, 38 L. Ed. 2d 526 (1973)	5
Hughes v. *Washington*, 389 U.S. 290, 293, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967)	5
Purvine v. *Hathaway*, 248 Or. 60, 393 P.2d 181 (1964)	5
Land Board v. *Corvallis Land & Gravel*, 99 Adv. Sh. 1532, — P.2d — (1974)	5
Borax Consolidated Ltd. v. *City of Los Angeles*, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935)	5
United States v. *Kansas City Ins. Co.*, 339 U.S. 799, 805, 70 S. Ct. 885, 94 L. Ed. 1277 (1950)	5
United States v. *Rands*, 389 U.S. 121, 123, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967)	5
United States v. *Chicago, M.S.P. & P.R. Co.*, 312 U.S. 592, 61 S. Ct. 772, 25 L. Ed. 1064 (1941)	5
Statutes	
United States Constitution, Fifth Amendment	2
Rivers and Harbors Act of 1899, § 10, 33 U.S.C. § 403	2, 5, 6
28 U.S.C. § 1345	3

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Petitioner, Sunset Cove, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered April 11, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is not yet reported. The opinion of the District Court (App. B) is reported unofficially in 5 E.R.C. 1023 and 3 E.L.R. 20370.

JURISDICTION

The Judgment of the Court of Appeals was dated and entered on April 11, 1975.

QUESTIONS PRESENTED

1. In the case of a sandspit which migrates at the confluence of a coastal stream and the ocean, must a permit from the Corps of Engineers, under 33 U.S.C. § 403, be obtained for fill material below the line of "substantial fast vegetation" if that line is above the line of "mean high tide"?

2. In the case of such a migrating coastal sandspit, at what point in time, if ever, may fill material be placed on that sandspit above the level of mean high tide without first obtaining a permit therefor from the Corps of Engineers?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

That part of the Fifth Amendment to the Constitution of the United States which provides:

". . . nor shall private property be taken for public use, without just compensation."

33 U.S.C. § 403, being Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, and reading as follows:

"403. *Obstruction of navigable waters generally—Excavations and filling in—Authorization by Secretary of Army.*—The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Army] prior to beginning the same. (Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151.)"

STATEMENT OF THE CASE

This is a suit by the United States of America to require petitioner to remove rock and fill material placed by petitioner on a sandspit abutting the confluence of the Necanicum River and the Pacific Ocean near Seaside, Oregon. Jurisdiction in the trial court was founded on 28 U.S.C. § 1345.

Because of the forces of the flowing and, sometimes flooding, river, the winds and the ever-changing sea, the boundaries of this coastal sandspit were constantly meandering, generally enlarging the spit in a northwesterly direction. In order to stabilize this sandspit against constant erosion, petitioner placed thereon rock and other fill materials and generally elevated its height, all without first obtaining a permit from the Chief of Engineers.

The trial court found, and the Court of Appeals affirmed, that the fill was made on land, "a substantial part of which was below mean high water at that time or shortly before, and most of which is below high water from time to time." The evidence was that, *at the time the work was performed*, all work was done above the line of mean high tide. The Decree, as modified by the Court of Appeals, required removal of so much of the fill "as will permit nature, in a reasonable period of time, to take its course and approximately re-establish former topographic conditions." The trial court had required removal of all fill placed north of a line which marked the boundary between "the substantial fast vegetation" (on the south) and the sand (on the north) as that line stood on June, 1967, being the date of aerial survey photographs taken by the Oregon State Highway Department. Petitioner had not commenced its land filling operations until mid-November, 1967.

Petitioner seeks review, reversal and remand to require the entry of a Decree not in conflict with the applicable decisions of this Court.

ARGUMENT

Both federal and Oregon state law have always given riparian landowners the benefit of all accretions to their lands and subjected them to the burdens of reliction.[1]

A long line of decisions of this Court have uniformly held that the jurisdiction of the United States of America under 33 U.S.C. § 403 exists only below the line of mean high tide; in cases of non-tidal waters, federal jurisdiction exists below the line of mean high water.[2]

The question not yet decided by this Court is: Do not these same rules apply in the case of a meandering and migrating sandspit at the confluence of a coastal stream and the ocean?

In this era of conflict between the interests of private property and the environment, it is important to determine if a landowner may protect himself from the uncontrolled forces of nature which might otherwise carry his land out to sea. It is, likewise, important to know the level of the water or land below

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[1] *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 325 et. seq., 94 S. Ct. 517, 38 L. Ed. 2d 526 (1973); *Hughes* v. *Washington*, 389 U.S. 290, 293, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967); *Purvine* v. *Hathaway*, 248 Or. 60, 393 P.2d 181 (1964); *Land Board* v. *Corvallis Land & Gravel*, 99 Adv. Sh. 1532, — P.2d — (1974).

[2] E.g., *Borax Consolidated Ltd.* v. *City of Los Angeles*, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935); *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 805, 70 S. Ct. 885, 94 L. Ed. 1277 (1950); *United States* v. *Rands*, 389 U.S. 121, 123, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967); *United States* v. *Chicago, M.S.P. & P.R. Co.*, 312 U.S. 592, 61 S. Ct. 772, 25 L. Ed. 1064 (1941).

which the jurisdiction of the Corps of Engineers prevails and above which the landowner is free to act without a permit from that federal agency.

Does not the well-established level of mean high tide apply to such a migrating shoreline? Or does the navigational servitude extend to the height of "substantial fast vegetation" in cases involving migrating coastal sandspits? Factors of rain, wind and soil affect the land's ability to support vegetation. In contrast, the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) was designed to protect navigable waterways. This statute has, nevertheless, been applied by the lower courts in such a way as to take petitioner's acreted land for public purposes until such time as that land can support "substantial fast vegetation."

If sandspits are to be treated differently than other lands abutting navigable waters, *when* is the line of federal control to be determined? In this case, the courts below set that date as being five months before petitioner commenced any work. Yet, because of natural forces during those five months, the sandspit continued its migrations. Thus, when the Court of Appeals affirmed the trial courts' finding that petitioner's work was on land which was below mean high water at the time of the work "or shortly before" and that the work was on land "which is below mean high water from time to time," it was holding that a private landowner may never improve his land if, at any time in the past or future, that land may have been or become below the level of mean high tide.

This point has never been settled by this court. Yet all of its past decisions would have led to a contrary result. Petitioner respectfully requests a Writ of Certiorari be issued.

Respectfully submitted,

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July 7, 1975

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. SUNSET COVE, INC., an Oregon corporation, *Appellant.*	No. 73-2198 OPINION

[April 11, 1975]

Appeal from the United States District Court
for the District of Oregon

Before: CHAMBERS, ELY, and GOODWIN,
Circuit Judges

PER CURIAM:

The district court ordered the removal of about 1760 lineal feet of riprap (rock used for construction foundations) and fill material from a sandspit at the mouth of the Necanicum River. Sunset Cove, Inc., the developer of the sandspit, appeals. The judgment is affirmed as modified.

Sunset, apparently acting upon its belief that the Necanicum River was not a navigable stream within the meaning of 33 U.S.C. § 403, attempted to fill and stabilize the shoreline of a tract of land it had acquired from the city of Seaside, without requesting authorization from the Secretary of the Army.

Because of seasonal movement of the Necanicum channel and the migratory character of the shoals and sandbars within the area of its confluence with the sea, the sandspit in question has historically tended to expand and retract up and down the coast from north to south. In recent years northwest expansion has preponderated. Sunset acquired whatever title the city had to the sandspit

during one of its more northerly extensions. Sunset then undertook to stabilize the sandspit against further erosion by the emplacement of riprap and by filling and elevating the surface to create building sites.

The district court, in findings of fact which are not clearly erroneous, found the Necanicum to be navigable and located the mean high-water line at a level that effectively declared the major part of Sunset's fill to be in violation of 33 U.S.C. § 403.

Substantial trial time was devoted to Sunset's efforts to establish some sort of estoppel against the Portland District of the United States Army Corps of Engineers. The court correctly found no basis for estoppel. Sunset was acting at its peril when, without permission it undertook to make improvements which effected permanent changes in the river channel and in its course.

In allowing the government's prayer for relief, the district court ordered the total removal of the illegal landfill. Such an operation is, as a practical matter, far beyond the resources of Sunset or its principals. Here, we believe the court might have tempered the law with a touch of equity.

The judgment should be modified to require the removal of as much of the riprap as will permit nature, in a reasonable period of time, to take its course and approximately re-establish former topographic conditions. The manner of removal, with the above standard as a guideline, should be supervised by the Chief of Engineers or his designee, pursuant to that officer's statutory responsibilities pertaining to navigable waters. In all other respects, the judgment of the district court is affirmed.

The district court may stay its judgment, if it sees fit, for a reasonable time to allow the defendant to apply to the Chief of Engineers for an after-the-fact permit to cover any part of the previous construction the Chief of Engineers may recommend for approval. *See* 33 C.F.R. § 209.120(g)(12)(ii)(b) (1974).

Affirmed in part; modified in part, and remanded.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 4-15-75—400

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil No. 71-313
	)	
vs.	)	
	)	OPINION
SUNSET COVE, INC., an Oregon corporation,	)	
	)	
	)	
Defendant.	)	

SKOPIL, Judge:

I

INTRODUCTION

The Government brings this action pursuant to 33 U.S.C. § 406 for an order that defendant remove an elevated sandspit alleged to be unlawful under 33 U.S.C. § 403. The Court has jurisdiction pursuant to 28 U.S.C. § 1345.

II

A. Physical Nature of the Waters. The Necanicum River has its source in the mountains

of Oregon's Coast Range.[1] It flows into the Pacific Ocean between the towns of Seaside and Gearhart, Oregon, approximately 15 miles south of the Columbia River. Less than a mile before it enters the ocean it is joined by the smaller Neawanna River and Neocoxie Creek. The area where these streams converge is an estuary of approximately 195 acres, consisting of tidal flatlands in addition to the area continuously submerged by water. The combined rivers are relatively small. The Necanicum is several hundred feet wide upon entering the estuary. It may vary from 2 to 12 feet in depth at the mouth, depending upon the tide. The Government's expert estimated that in addition to the tidal flow there was a probable fresh water discharge

1/ Of the exhibits which defendant objected to, the Court has used 5A, 80 - 90, 101, 112, 115 and 117. The Court disregarded irreavant exhibits and parts thereof.

of at least 6,000 cubic feet per second in peak conditions. Peak conditions occur on an average of every two years.

The rivers wander through the estuary, having no fixed location. Historically, the mouth of the combined river has wandered up and down the coast for several thousand feet. Just as the mouth of the river has no fixed location, so also the various channels of the estuary. Residents of the area have long been aware of the meandering of the Necanicum. Some claim to be able to predict its movements, and some experts think they may be cyclical. Hydrologists apparently are unable to determine exactly what combination of tide, wind, runoff, sand deposit and other forces causes the changes. In the past, the river has probably wandered even more widely. By 1967, it had been confined somewhat by rip-rapping at various places along the channel, by raising the level of the adjoining land, and by other means.

Seaside and Gearhart are mainly beach resorts.[2] In the summer there is a good deal of small boating along the Necanicum. A few commercial fishermen go down the river to the ocean to fish.

B. Defendant's Project. Depending on the location of the river mouth, there are two portable sandspits. As the mouth moves south, the northerly Gearhart spit becomes longer. As it moves north, the southerly Seaside spit becomes longer. For a number of years, prior to about 1965, the sandspit and adjacent land belonged to the City of Seaside,[3] the former owner having lost title for

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2/ It was at Seaside that Lewis & Clark terminated their expedition, shortly after crossing the Necanicum River from the North. In their journal they related how they "proceeded on the Sandy beech nearly South for 3 miles to the mouth of (a) butifull river with bold and rapid current of 85 yards wide and 3 feet deep in the Shallowest place."

3/ The Government disputes Seaside's title, a contention which is unnecessary to resolve.

nonpayment of taxes. In that year, the City had sold the land at auction to William Holmstrom who had plans for developing it. With several others he formed the predecessor to the defendant in this case to exploit the property. The corporation had several alternatives in mind, including "private estates, condominiums, motel-restaurant, a shopping-and-living complex, and a major boat marina." Before anything could be built there, however, the elevation of the spit and the tidewater flat had to be raised. The work began in mid-November, 1967, and was substantially complete by the end of January, 1968. The eventual result was an elevated spit of between 22 to 24.5 feet above sea level, approximately 1760 feet long, and 335 to 440 feet wide, covering 17 acres or approximately nine percent of the estuary. On the ocean side the sand was protected against washing away by a rip-rap embankment composed of layers of variously sized rock several feet thick. The sand-filled spit did not cover all

the property owned by the defendant but only the part determined to be six feet or more above mean high water.

In early 1968, after the sand fill was substantially complete, the State of Oregon brought suit against defendant. It claimed to be the owner of the beach and asserted that the removal of the sand used in the construction of the fill was without its permission and resulted in damage to clam beds and to the public's right to use the beach. The state court partially upheld the State's legal position and granted an injunction against further sand removal, but in its evaluation of the equities, declined to award damages for the sand already removed.

Defendant never sought nor received a permit from the United States Army Corps of Engineers (hereinafter "Corps") for its work. There had been various exchanges between them before this suit was brought. The Corps also received a number of letters and visits from

opponents of the project, including a citizen's group, the Necanicum Riverbank Protective Association, and the Department of the Interior. The former had various motives. Some members were property owners along the north side of the estuary who believed that the erosion of their waterfront property was caused by the sand fill's northerly deflection both of the stream and the ocean waves, particularly when storms were from the southwest. Others opposed the project for esthetic, environmental and recreational reasons. The Department of the Interior was principally concerned with its environmental impact. It claimed that the mixture of salt and fresh water and the alternate flooding and exposing of areas within the estuary supported a wide variety of marine life which in turn supported life in the ocean itself. The estuary was also said to be useful to water fowl, including those which migrate along the Pacific Flyway.

In May of 1970, the mouth of the river began to wasn away. About 60 to 80 yards of the north end of the sand fill were lost. The defendant stemmed the damage by dumping rock into the water and along the edge of the embankment to form a protective barrier.

C. Issues in Litigation. The Government claims that the sand fill is in violation of 33 U.S.C. s 403, which provides in pertinent part:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States...except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to the beginning of the same."

Defendant argues that the Necanicum is not a navigable water of the United States, and that even if it is, it did not violate the statute, and that in any event the Government is estopped from objecting now.

The Government also alleges that it has standing to object to the project under Federal common law to protect the interest of the public, and also asserts rights as a property owner in the area. Because of the disposition the Court makes of the case, it is unnecessary to consider these arguments.

III

NAVIGABILITY OF THE NECANICUM

A. The Corps has always considered the Necanicum to be navigable from the sea to three miles upstream. It has been so listed in official publications for a number of years. The earliest evidenc of the exercise of its jurisdiction to require permit applications for work which affects the river is a permit granted in 1921. Perhaps a dozen have been issued since. Furthermore, the Subcommittee on Submerged and Submersible lands of the Oregon

State Legislature listed the Necanicum in its compilation of navigable waterways in this state.

The administrative classification of the river is conceded not to be binding upon this Court. However, it is entitled to respect. The river is legally navigable if it is navigable in fact. Such factual determinations must be made case by case, but the classic test is that a river is navigable if it has been, is, or may be used, with or without reasonable improvements, as a highway for commerce over which trade and travel is, or may be, conducted in the customary modes. When the additional question is added, whether it is navigable in interstate commerce, the river must form, either by itself or by uniting with other waters, a route over which commerce may be carried to other states or foreign countries. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940); United States v. Utah, 283 U.S. 64 (1931); The Daniel Ball, 77 U.S. 557

(1870); Johnson v. Wurthman, 227 F. Supp. 135 (D. Ore. 1964).

These waters are obviously passable at least by boats of the size used by the commercial fishermen. These are motorized dories about 21 feet long, 5 feet wide and with a draft of 18 inches or more. Each year these fishermen catch several thousand pounds of fish. The fish is sold to a local concern which either resells it or packs it and ships it away. The fishermen sometimes have difficulty in crossing the bar into the ocean at very low tides when the water may be as shallow as two to four feet in places. There is no difficulty at high tide, however, when the water may be 12 feet deep at the bar. One fisherman testified that he found it easier to use the Necanicum as a route to the ocean than the Columbia.

Other current users of these waters are private recreational boaters. In the past they have been used for floating logs to a box factory. There was evidence that in past years excursion boats of unspecified size carried

passengers on the river and that a seaplane once landed upon it.

There was no evidence of any other commercial use. The waters at present are unsuitable for the larger commercial vessels. The lack of use is attributed to several reasons. Since the Columbia River is so near, there is no great demand for extensive facilities on the Necanicum. Its vicinity has a relatively small population and at present has no need for extensive water-borne commerce. Railroads and highways appear to be sufficient. It is principally for these reasons that past attempts of the City of Seaside to have the channel dredged have been unsuccessful. However, it has not prevented others, including the defendant, from hoping to establish a "major boat marina" there. The Crown Zellerbach Company once considered constructing a canal system connecting the Necanicum to the Skipinon in order to float logs to Warrenton on the Columbia River.

The evidence, therefore, is that the river

will readily support navigation by vessels larger than those which could be used on rivers declared navigable in other cases.[4/]

It must be remembered that at stake is the sovereign and historic power of the Government to regulate in the public interest. A

4/ In Appalachian Electric Power Co., supra, a section of Virginia's New River was declared navigable although shallow water, rapids and waterfalls made it difficult for passage. The government had demonstrated the possibility of navigation by sending an outboard motor survey boat, 16 feet long, 5 feet wide, with a draft of 3 feet, along the river. Although the crew had to get out and push at times, they did not have to do so for more than a mile and a quarter going upstream. Fifty years before, the Army thought it would be possible to improve the river in order to float keel boats of 2-foot draft. See also, Utah v. United States, 403 U.S. 9(1971); United States v. Utah, supra; Economy Light Co. v. United States, 256 U.S. 113 (1921); State of Wisconsin v. F.P.C., 214 F. 2d 334 (7th Cir.), cert. denied, 348 U.S. 883 (1954); Wisconsin Public Service Corp. v. F.P.C., 147 f. 2d 743 (7th Cir.), cert. denied 325 U.S. 880 (1945); compare United States vs. Oregon, 295 U.S. 1 (1935), in which the court found that a lake with a depth of one to two inches most of the year was not navigable.

determination of non-navigability now would foreclose that power for the indefinite future. Appalachain Electric Co., supra at 405. It is unimportant that the river sees relatively little commerical use now. Navigability must also be tested by the distant past and the extended future. United States v. Utah, supra; Economy Light Co., supra at 124. ALthough it is not clear whether the use of the waterway by pleasure boats is sufficient interstate commerce, their use does demonstrate the waterway's availability for similar kinds of commercial vessels. Appalachian Electric Power Co., supra at 416.

Defendant seems to concede navigability upstream but questions whether it is navigable at the mouth. However, the bar and the shoals which block passage by larger vessels are not particularly important. Appalachian Electric Power Co., supra at 409; United States v. Utah, supra; The Montello, 87 U.S. 430, 443 (1874); Montana Power Co. v. F,P.C., 185 F. 2d 491

(D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951). Furthermore, fishing boats do pass, and at high tide the channel is adequate. Economy Light Co., supra at 122. Finally, it is not significant that the evidence of navigability was only slightly in the context of interstate commerce. The Necanicum flows into the Pacific Ocean and, thus, forms "by uniting with other waters, a continued highway over which commerce... may be carried on with other states or foreign countries." The Daniel Ball, supra at 565; Rochester Gas Co. v. United States, 344 F. 2d 594, 597 (2nd Cir.), cert. denied, 382 U.S. 832 (1965). The question is whether it could be used in interstate commerce, and not exclusively whether it has been so used. The latter test, if exclusive, would make the Government's permanent regulatory power dependent upon vagaries of proof of historical facts.

Therefore, the Court finds that the Necanicum, in the area relevant to this case, is navigable within the meaning of 32 U.S.C. §§ 403.

B. The Boundaries of the Navigable Servitude. The cases which treat the problem of determining the geographical limits of the Government's power to regulate fall into two categories. For tidal waters, the navigable servitude extends to the line of mean high water, as the parties agree.[5/] The other category is rivers and lakes, the limit of the servitude being ordinary high water. United States v. Virginia E. & P. Co., 365 U.S. 64 (1961). The definition of this line is somewhat less precise than that for mean high water.[6/] It is sometimes related to the line below which water has prevented vegetation from growing. Borough of Ford City v. United States, 345 F 2d 645 (3rd Cir.), cert.denied, 382 U.S. 902 (1965);

5/ Mean high water is the average height above sea level of the twice-daily high tides preferably measured over an 18.6 year period. Although different figures have been used in this case, the parties agreed in the pretrial order to the existence of an official report measuring mean high water as 4.7 feet at the sewage plant.

6/ See, e.g., 33 C.F.R. §§ 209.260(j)(1)(i).

United States v. Chicago, B. & Q. R. Co., 90 F. 2d 161, 170 (7th Cir.), cert.denied, 302 U.S. 714 (1937).

There are no cases dealing with the particular problem of meandering rivers and estuaries.[7/] The area with which this lawsuit is concerned has characteristics both of the ocean and of the river. The conjunction of forces creates natural features to which the precedents are not entirely applicable.

The Government urges that its jurisdiction be defined as the area in which the river is accustomed to flow from time to time in its northerly or southerly meandering, and the areas which are below mean high water from time to time, depending on the patterns in the estuary.

7/ However, see 33 C.F.R. § 209.260(l). In some respects the Necanicum is similar to the Red River, Oklahoma v. Texas, 260 U.S. 606, 634-35 (1923). The Red River has a bed which is 1/3 to 1-1/4 miles across, only a small part of which is usually occupied by the channel, which shifts its location frequently.

This definition would include most or all of the defendant's sand fill. The defendant, on the other hand, argues that the limits of the Government's power are the channel of the river as of the time it did its construction, and the line of mean high water at the same time. This definition would exclude most or all of the fill.

The Government proved that the river has flowed as far south as the southernmost end of the sand fill. Photographs showed the river in the area now occupied by all or part of the sand fill at least in 1948, 1960, 1963, possibly 1966, and 1967.[8/] Other evidence indicated it was there more frequently. The owner of the Gearhart spit testified that the mouth swung back and forth once or twice per year. At least some of defendant's officers had long known that the river sometimes flowed there. But the river was more to the north when the construction was done, and the surveyor, who was a

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8/ There apparently were not photographs for all years. In 1963 and 1966, only the area now covered by the northern tip was then under water. However, shallow depressions with water extended across the southern base. See exhibits 63A and 66D.

part owner of defendant, claimed to have staked out the boundaries of the fill along the six-foot line. However, the Government's expert testified that much of the fill was on land substantially below mean high water.[9/] The apparent discrepancy between defendant's testimony and the Government's expert may be reconciled. The latter determined the elevation of the land as of AUgust 16, 1966, using photogrametric techniques on aerial photographs and other data. Defendant's surveyor established the six-foot lines as of sometime in 1967. Both may have been right, for it is likely that the elevation of the land changed within the year.[10/]

While defendant attempted to discount the importance of the Government's photographs and other evidence at trial, it relied heavily on an aerial photographic map made by the State Highway

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9/ The elevation varied between 5.7 feet below and 1.3 feet above mean high water, using 4.7 feet as mean high water.

10/ Defendant seems to concede the variability in this area by characterizing the 1966 photograph as "outdated."

Department in June, 1967, which was claimed to show the river to be further north at that time than it was in the Government's photographs. It asserted that before filling, it checked and rechecked its lines against this map. When the June, 1967, map is compared with a February, 1968, map, also by the State Highway Department, of the same are and to the same scale,[11/] showing the area after the spit was built, it is plainly evident that a substantial part of the fill was below the 5.7 foot line, not to mention the 6-foot line claimed by the defendant. Furthermore, part of the area now covered by the fill was even covered by the river water at that time. The exhibits raise considerable doubts about defendant's carefulness.

C. Conclusion. The fill was made on land, a substantial part of which was below mean high water at that time or shortly before, and most or all of which is below mean high water from time to time. It now extends across almost

11/ Exhibits T and 200, partially reproduced in Appendices A and B.

half of the range within which the mouth of the river has migrated in the past. The river, therefore, is confined to half the distance previously available to it. It attempted to move back south in the summer of 1970, and washed out a substantial part of the sand fill before it was thwarted. One possible effect upon navigation is obvious. The shortest route for the Necanicum to take to the ocean is directly across the southernmost end of the fill. HOwever, if the fill remains, the river is permanently forced to continue 1,500 to 2,000 feet around it. The Government introduced evidence that the shifting of the river's limits caused shoaling. It was attributed in part to sand which was claimed to be leaching from the sand fill itself. The Government's expert also testified that the fill increased water velocities which caused erosion on the north shore and otherwise obstructed navigation and affected the area. The defendant's expert cast doubt on these conclusions. It appears to the Court that the evidence on these

points is inconclusive. The river is shallower in places now, and the north shore has eroded several hundred feet, but whether these are effects of the fill is unknown.

It must be remembered that the relevant statute is a broad one. Wihtout the permission of the Corps, the defendant could not lawfully "alter or modify the course, condition, or capacity" of the river. The simple fact of permanently confining the channel to its present location is plainly a modification of its condition.

In effect what defendant did was to catch the river at a time when it was to the north, and fix the sandspit permanently while it was temporarily (and partially) above mean high water. If that were permissible, obviously the owner of the northerly spit could have done the same, waiting for the day when the river was flowing to the south. By taking advnatage of temporary variations, the river could be pinned down and perhaps much of the estuary could be filled in and eliminated. In the opinion of the Court,

the decision to so alter a water impressed with a public servitude is a decision which must be made by the lawfully authorized public agency, and not by private persons. The sand fill was contrary not only to the letter of the statute but also to its spirit.

IV

ESTOPPEL

Defendant's final argument is that even if the fill is illegal, the Government should be estopped from objecting. While conceding that estoppel against the Government, particularly in its sovereign and regulatory functions, is not a favored doctrine, defendant urges that the facts of this case are so compelling as to warrant an exception. There is considerable dispute about the relationship between the Corps and the defendant when the fill was built.

Although defendant had considerable contact with state agencies, it did not provide plans in advance to the Corps nor did it seek an advance opinion on their legality. The earliest evidence of contract with the Corps was testimony of one of defendant's owners that he telephoned an offi-

cial in Seattle who informed him that the river was navigable, that no harbor lines had been established, that the Corps' jurisdiction extended to mean high water, and that he should deal with the Portland District Office. About October 1, 1967, he telephoned an unidentified individual[12/] in the Portland office who allegedly told him that it was safe to stay above six feet. Personnel of either the Corps or of the Coast and Geodetic Survey, or both, said the high water elevation was 5.44 or 5.7 feet.

In October or November, 1967, the superintendent of the project telephoned the Portland office to inquire about dredging the river. He was told he could not take sand from the river without a permit.

The sandfilling and rip-rapping was carried out between November of 1967 and the end of January, 1968. During this period, defendant's only contact with the Corps was with one of its

12/ The witness testified that it was either George Hyde or one of his assistants. There is no record of the call.

only contact with the Corps was with one of its employees, Jerome Shelver, who lived nearby. He was responsible for dredging operations in the area and at times acted as the local representative for the Corps.[13/] His first knowledge of the project was November 30, 1967, when he received a telephone call from a local resident. He testified that his first visit to the project was on January 30, 1968, by which time it had been substantially completed. His testimony was supported by his diaries. Witnesses for defendant testified he had come on the property several times before. According to them, he was favorably disposed toward the project and said a permit wasn't required so long as they stayed above high water.

The witnesses did agree that Shelver visited the site on January 30. At that time, he was given a copy of the project plans, and there was discussion about need for a permit. According to defendant, this related to rock

13/ He did not have authority from the Corps to issue permits.

dropped in the river and to the possibility of dredging sand from the river. According to Shelver, he said that the fill itself may be encroaching on the river. Shelver's official report tends to support defendant's version.

On February 6, 1968, George Hyde, the Chief of the Navigation Divison and Shelver's superior,[14/] wrote the Continental Engineering Company.[15/] The letter stated, "Concern has been expressed that the fill may encroach on the channel of the river, causing a restriction in the channel." It went on to say that if dredging or filling in the river would be required, a permit must be obtained, and enclosed instructions for a permit. A few days later, Shelver asked Roy Brockschink, another supervisor, if a permit were necessary, and he recieved an affirmative reply. Several days later he reported he had given a permit manual to George Palmerton and "pointed out

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14/ Throughout the Corps' relationship with defendant, its higher echelon officers were noticeably cooler toward the project than the lower ranks. See Montana Power Co. supra at 497.

15/ This company did the work on the fill. It was owned by the Palmertons who also owned a major interest in defendant.

that their embankment work involves navigational interest and must be covered by a permit." Palmerton said that when the state lawsuit was over, he would apply for a permit. The project was in suspension at that time.

On February 13, 1968, the newspaper Oregon Journal printed an aerial photograph of the site which showed the fill completely surrounded by water.

By February 14, the affair had come to the attention of Col. Robert L. Bangert, District Engineer, and the highest-ranking official in the area. He wrote the defendant that the embankment was encroaching upon and restricting the river and that a permit must be obtained. He indicated that although the structure was complete, an after-the-fact permit might be possible. He concluded with a warning that all past and future work was at defendant's risk.

On February 19, Shelver and another of his superiors, Dean Harshberger, visited the site. Their report was equivocal about any

encroachment, but said any further work certainly would be. He reported that one of the defendant's consultants promised to expedite the permit application. Defendant's evidence tended to show that the discussion was mainly about further work rather than past work.

On March 11, defendant's attorney replied to Col. Bangert's letter. He indicated the plans "do not at this time contemplate encroachment upon or restriction of the flow of the Necanicum River." He promised to apply for a permit if such were contemplated.

Shelver was ordered to maintain surveillance on the development. On March 20, he made his first report and sent along photographs. They showed the high tide reaching and touching the fill.

For over a year the project remained in limbo pending the outcome of the state trial. Shelver made periodic reports on the fill and surrounding estuary. The state court decree was issued in June, 1969. The following month de-

fendant was refinanced by a new stockholder. No work was done on the fill. In May of 1970, the river moved south and began to wash the fill away. Defendant's protective diking and rip-rapping focused attention on the project again. The Corps insisted that defendant apply for an after-the-fact permit and upon refusal filed this lawsuit.

In the opinion of the Court, there are several reasons the facts do not warrant an estoppel against the Government, assuming that were legally possible.

The telephone inquiries to Corps employees in Seattle and Portland are an insufficient basis for estoppel. There is no written record of these calls, and the only evidence of them was the recollection of one of defendant's owners. The identity of the second official is unknown. Neither of them had defendant's plans before them, and it is unclear in what context the answers were given. The answers were substantially accurate, as far as they went. The Corps is not claiming now that mean high water is at a higher elevation than it allegedly represented to de-

fendant. It challenges defendant's method of applying the information. There is no indication that defendant mentioned the special characteristics of the river and the estuary.

In the strict sense of the word, defendant was not relying on any representations of the Government or its agents. It never submitted its plans to the Corps until after the work was doen. Rather, it relied on the judgment of its own officers and attorneys that its plans were lawful.[16/] It could not have been relying upon representations by the Corps that its project was lawful because it had commenced its work before the Corps became aware of what the project was. It was not until after construction started that Shelver appeared on the scene. His approval had nothing to do with the initial decision to construct it. It may have reassured defendant's officers, but if he had never appeared, the project would have continued just the same.

16/ Similarly, when defendant extended the rip-rap in 1970, according to its major stockholder, it decided to consult state agencies but not the Corps since it decided it was not encroaching on navigable waters.

Defendant's officers knew as much or more as the Corps about the circumstances which made this project questionable. They knew the river meandered and the land on which they sought to build was at times under water. The State Land Board had told Holmstrom the river moved with the regularity of a pendulum. Defendant claimed to have relied on the most recent map and chart of the area, made in June, 1967, to determine the high-water line. Yet, it is clear from the photographs that the sand fill covered areas which were not only below the six-foot mark, but were also below the 5.7-foot boundary line which defendant asserted it understood was mean high-water.[17/] In fact, part of the sand fill was in the water. In view of defendant's assertions that it checked and rechecked its lines against the 1967 map, the discrepancy should have put defendant on notice that its calculations were unreliable.

Estoppel is one means by which a private party may have some security in dealing with the Government. Here, there was available to defend-

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17/ Compare Exhibits T and 200, Appendices A & B

and a method by which it could have achieved a much greater degree of security. Had it made an application in advance to the Corps for a permit, or at least if it had made an inquiry and provided the Corps with complete plans of its intentions, its position would be less vulnerable. By failing to take advantage of the opportunity which it had, not only did it forfeit a claim to a right of estoppel, but it also deprived the Corps of a means whereby its attention could have been formally directed to the issue. If the permit were sought, the matter would have come to the officials who had the authority to grant it and not just to those who were in the vicinity and happened on the project. It would have given the Corps an opportunity to become conscious of the changing nature of the river and estuary. By publishing notice of the application, the Corps could have afforded an opportunity to adjacent landowners and other residents to express their concern about anticipated erosion and other adverse effects. As the Department of the Interior

pointed out, had it had a chance to comment on the fill, it would have objected for environmental reasons. The defendant, without notice to the Corps, started and completed this work within two and one-half months. Now, defendant wishes to thwart the regulatory powers of the Government because of its failure to hear about the project promptly and to step in to decisively halt it.

It is hard to determine precisely the attitudes of the Corps and defendant with respect to a permit in February and March of 1968. No doubt defendant in good faith believed it was not necessary. The officials of the Corps had not framed in their minds their conclusive attitudes toward the project. When permits were discussed, the evidence is ambiguous whether they had in mind the handling of rock, an extension north of the sand fill, filling in the rest of the 44 acres, or the work that was already done. Nevertheless, two conclusions may be made. The first substantial and recorded contact between the Corps and defendant occurred

after the fill had been accomplished. Any conduct of the representatives of the Corps could not, after that time, harm the defendant. Second, the highest official of the Corps, Col. Bangert, did state unequivocally that a permit was required as soon as the project came to his attention. Defendant was at least on notice that the Corps had not approved the fill and reserved its rights to have it taken out.

There is even less reason to find an estoppel with respect to the refinancing of defendant in 1969. It may be questioned whether defendant has standing to raise the issue since it was the stockholders and not defendant who changed position. In any event, however, as of that time there was more than sufficient reason for defendant and its owners to know that the Corps had not approved the project and had not resolved its doubts. As far as can be determined, the defendant did not seek the opinion of the Government at this time. Rather, it again relied on its own judgment as did its

stockholders, officers and attorneys.

V

RELIEF

Although it is difficult to determine precisely how much of the fill is illegal, a convenient line is the one which marks the boundary between the substantial fast vegetation and sand on the June, 1967 map.[18/] Oklahoma v. Texas, supra at 629. This line coincides approximately with the rip-rapping installed by the Corps in 1948 and which bars the river from migrating further to the south. It is also the southernmost line shown by the Government's photographs to have been reached by the river.

Pursuant to 32 U.S.C. § 406, the Court grants the relief requested by the Government. Counsel for the plaintiff should prepare and present a judgment order.

The foregoing shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

DATED this 12th day of February, 1973.

/s/ Judge Otto R. Skopil, Jr
United States District
Judge

18/ Exhibit T.

Supreme Court, U. S.
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No. 75-49

In the Supreme Court of the United States

OCTOBER TERM, 1975

SUNSET COVE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in holding that the sand spit which petitioner filled without obtaining the consent of the Corps of Engineers was below the mean high water line and was thus subject to federal regulation pursuant to 33 U.S.C. 403.

The Necanicum River flows into the Pacific Ocean between the towns of Seaside and Gearhart, Oregon, creating an estuary of tidal flats and shallow water. The river mouth meanders through the estuary moving the sandbars near the mouth as it does so. When one of the sandbars was in front of petitioner's riparian property, petitioner, without seeking or receiving the consent of the Corps of Engineers, deposited fill material on it to stabilize its position so that it could use the bar for commercial construction (Pet. App. B, 1b-6b).

The district court found as facts that the river is navigable at the area in question (Pet. App. B, 9b-15b) and that the majority of petitioner's fill (Pet. App. B, 20b-21b):

> * * * [was] on land, a substantial part of which was below mean high water at that time or shortly before, and most or all of which is below mean high water from time to time. It now extends across almost half of the range within which the mouth of the river has migrated in the past. The river, therefore, is confined to half the distance previously available to it.

The district court, admitting that it is difficult to determine exactly how much of the fill was illegal, established as a practical demarcation the line of substantial fast vegetation and ordered petitioner to remove the fill beneath that line (Pet. App. B, 35b).

The court of appeals affirmed the district court's finding that a substantial part of petitioner's work was done below the mean high water line of the river and was thus in violation of 33 U.S.C. 403 as the consent of the Corps of Engineers had neither been sought nor obtained. It modified the relief decreed, however, to relieve petitioner of the obligation of removing the fill it had put in, requiring it to remove only as much of the rip-rap (rock embankment) as necessary to permit the river to re-establish its natural course. It also permitted petitioner to apply to the Chief of Engineers for an after-the-fact permit for any part of the previous construction the Chief of Engineers may recommend for approval (Pet. App. A, 1a-2a).

1. The decision below is correct, primarily concerns applying established law to the peculiar facts of this case, and presents no issue warranting further review. As the district court recognized in an opinion on which, together with the opinion of the court of appeals, we

primarily rely, the water levels near the mouth of the Necanicum River are affected by an interplay of forces—the tidal action of the Pacific Ocean and the swift currents of a river originating in the mountains. The court applied the established law concerning the boundaries of the United States' navigational servitude in tidal and riverine waters in defining the breadth of the federal regulatory jurisdiction, namely, whether the construction was on land beneath mean high water (Pet. App. B, 16b). See also *United States* v. *Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596-597: "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark."[1]

Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403, broadly forbids any excavation, filling or modification of the channel of any navigable water of the United States or construction in any harbor or other waters of the United States without the consent in advance of the United States through the Chief of Engineers. The district court thus properly found that the fill in question was subject to the provisions of that Act and that the consent of the government had not been obtained. As the district court pointed out, petitioner managed "to catch the river at a time when it was to the north, and fix the sandspit permanently while it was temporarily (and partially) above

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[1]Nor did the district court ignore the effect of tidal waters in determining the extent of the federal servitude. The Court has defined mean high water in such contexts as the "mean of all the high tides" over a period of 18.6 years (a complete lunar cycle). *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10, 26-27. The district court utilized the mean high tide data available and applied the data in reaching its conclusion that the fill had been placed below the elevation of the mean high tides in that area (Pet. App. B, 16b).

mean high water. If that were permissible, obviously the owner of the northerly spit could have done the same, waiting for the day when the river was flowing to the south. By taking advantage of temporary variations, the river could be pinned down and perhaps much of the estuary could be filled in and eliminated" (Pet. App. B, 22b). Compare *Sanitary District of Chicago* v. *United States*, 266 U.S. 405; *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 707-708. There is, in short, no substantial question of law presented by petitioner for this Court to consider.

2. Petitioner's suggestion (Pet. 2, 6) that the district court may have improperly used the vegetation line as the measure of the servitude or extent of 33 U.S.C. 403 is without merit. The court first determined that the fill was largely on land beneath mean high water. Then, because of the difficulty of determining exactly what portion should be removed, the court designated the vegetation line as a visible and appropriate line to use in removing the fill, but not as the test for the applicability of the Act. In any event the court of appeals' modification of the remedy, which does not rely on the vegetation line, renders this question moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.